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No. 86-378

UNITED STATES SUPREME COURT

October Term, 1986

PLANNED PARENTHOOD OF CENTRAL AND NORTHERN ARIZONA, an Arizona nonprofit corporation; PLANNED PARENTHOOD OF SOUTHERN ARIZONA, an Arizona nonprofit corporation; and JACK BASHAW, M.D., Cross-Appellants,

v.

BRUCE E. BABBITT, Governor of the State of Arizona; DOUGLAS PATINO, Director of the Department of Economic Security; and ROBERT K. CORBIN, Attorney General of the State of Arizona, Cross-Appellees,

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On appeal from the
United States Court of Appeals
for the Ninth Circuit

MOTION TO DISMISS OR AFFIRM

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Cross-appellees move to dismiss the cross-appellant (Planned Parenthood)'s appeal from the October 18, 1983 decision of the Court of Appeals for the Ninth Circuit for the reasons that (1) Planned Parenthood never raised in the court below the unconstitutionality of the first paragraph of the Arizona footnote; and (2) the Court of Appeals decision appealed from is plainly correct.

STATEMENT OF THE CASE

In fiscal year 1980-81, Arizona placed a footnote on state appropriations in its Department of Economic Security legislation. The footnote provides:

> No state money may be spent by the department of economic security by contract, grant or otherwise, on abortions, abortion procedures, counseling for abortion procedures or abortion referrals. These restrictions are not applicable when it is necessary to save the life of a pregnant woman.
>
> No state money, other than money for comprehnsive medical and dental

> care and the developmentally disabled, may be given by the department of economic security by contract, grant or otherwise to agencies or entities which offer abortions, abortion procedures, counseling for abortion procedures or abortion referrals. Governmental agencies or entities are exempt from the restrictions in this paragraph.

The first paragraph of the footnote proscribes the use of state money for abortions and certain abortion-related activities. The second paragraph prohibited funding by the state to any entity which provides abortions and certain abortion-related activities. The district court found that the footnote was void for vagueness and struck down the footnote also on First Amendment grounds. In its first opinion, Planned Parenthood v. Arizona, 718 F.2d 938 (9th Cir. 1983) (Planned Parenthood I), the Court of Appeals for the Ninth Circuit upheld the first paragraph of the footnote, reversed the void-for-vagueness decision, and remanded the case to the dis-

trict court to ascertain certain facts which it believed would be determinative of the constitutionality of the second paragraph of the footnote. Upon remand, the district court, in an unpublished order, granted Planned Parenthood's motion for summary judgment. The Court of Appeals affirmed that decision, Planned Parenthood v. Arizona, 789 F.2d 1348 (9th Cir. 1986) (Planned Parenthood II). The state defendants have appealed that decision to this Court, Bruce Babbitt, et al. v. Planned Parenthood, No. 86-369. Planned Parenthood has conditionally cross-appealed not from Planned Parenthood II, but from Planned Parenthood I, a decision from which they could have, but did not, seek certiorari in this Court.

ARGUMENT

The cross-appellants (Planned Parenthood) never argued in the Court of Appeals

that the state proscription as to the use of state funds for abortion and abortion-related activities was unconstitutional. In fact, Planned Parenthood expressly conceded in their brief below that it "does not seek, as the State implies, to force the State to fund activities which it has chosen not to fund . . . ."[1/] And it reiterated that "Planned Parenthood does not seek to compel funding of activities which the State has chosen not to fund."[2/] Moreover, in its motion for rehearing in the court below, Planned Parenthood did not argue that the Court of Appeals' decision as to the constitutionality of the State's proscription of the use of state funds was erroneous. That issue was raised for the first time only by the

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1. Appellees' brief at p. 12--See Appendix.

2. Appellees' brief at p. 16--See Appendix.

American Civil Liberities Union (ACLU) in its brief amicus curiae urging rehearing.[3/] Upon denial of its motion for rehearing and suggestion for rehearing en banc, Planned Parenthood did not seek review by certiorari in this Court.

Cross-appellees submit that a party which had expressly agreed, waived or conceded an issue in the court below cannot change its course and urge this Court to reverse or overrule a decision based on its agreement, waiver or concession. Public Service Commission v. Havemeyer, 296 U.S. 506 (1936); Mercelis v. Wilson, 235 U.S. 579 (1915); Cavender v. Cavender, 114 U.S. 464 (1885).

Additionally, it is the general rule that a federal appellate court does not consider an issue not presented for review

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3. The Court of Appeals, by order dated March 27, 1984, denied as moot ACLU's motion to appear as amicus curiae.

below. Youakin v. Miller, 425 U.S. 231 (1976); Hormel v. Helvering, 312 U.S. 552 (1941). Cross-appellants cannot, in this cross-appeal, raise the issue that the first paragraph of the Arizona footnote is unconstitutional.

Cross-appellants also argue that the Court of Appeals' decision in Planned Parenthood I that the footnote was not void for vagueness is erroneous. That argument has no merit. As the Court of Appeals recognized, although Planned Parenthood, in its arguments below, employed the terms "abortion counseling" and "counseling for abortion procedures" interchangeably, the Arizona Legislature used only the latter language. Moreover, the latter term has been authoritatively interpreted by the Arizona Attorney General to apply to "counseling insofar as such counseling explains abortion procedures. That is not to say that a doctor . . . may not use the word

'abortion' in his consultation with his patient. The footnote should not be construed to intervene with the doctor-patient privilege and the doctor's obligation to his patient (Ariz.Atty Gen.Op. No. I79-252 at 3, n. 5, Oct. 11, 1979)." Planned Parenthood I, 718 F.2d 938, 949.[4/]

The term "counseling for abortion procedures" is not vague as interpreted by the Arizona Attorney General's opinion which predated the adoption of the footnote in question. Planned Parenthood's attempt to continue their mischaracterization of this language and its meaning should not be permitted.

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4. In Arizona, Attorney General opinions are provided for by statute. Arizona Revised Statutes § 41-193.A.7 provides that the department of law shall "upon demand by the legislature or either house thereof, any public officer or a county attorney, render a written opinion upon any question relating to their offices. Such opinions shall be public records."

CONCLUSION

Planned Parenthood's conditional cross-appeal is frivolous and the motion to dismiss or affirm should be granted.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General

ANTHONY B. CHING
Solicitor General

A P P E N D I X

Excerpts from Planned Parenthood's Brief
in the United States Court of Appeals
for the Ninth Circuit, No. 82-5437
(718 F.2d 938 (9th Cir. 1983))

Pages 12-13 of brief: Appendix page 1

Page 16 of brief: Appendix page 3

ARGUMENT

I. THE DENIAL OF STATE FUNDS TO PLANNED PARENTHOOD CONSTITUTES A PENALTY FOR EXERCISING CONSTITUTIONAL RIGHTS[3]

The State's argument that its denial to Planned Parenthood of State funds (to which Planned Parenthood would otherwise be entitled) is not a penalty imposed upon the exercise of its constitutional rights, is without merit. Planned Parenthood does not

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3 With respect to this Court's review of the trial court's granting of Planned Parenthood's Motion for Summary Judgment, the reviewing court is to apply the same test applied by the trial court. That is, affirmance is appropriate if there exists no genuine issue of material fact, and the moving party is entitled to prevail as a matter of law. See, Rule 56(c), F.R.C.P.; Radobenko v. Automated Equipment Corporation, 520 F.2d 540, 543 (9th Cir. 1975).

seek, as the State implies, to force the State to fund activities which it has chosen not to fund. Rather, the State of Arizona has mde an affirmative decision tc fund family planned programs. The record before the trial court established that the State made available, for purposes of State matching funds under Title XX family planning programs, $54,278.00, for the period of October 1, 1980 until June 30, 1981. (Planned Parenthood's Memorandum in Support of Motion for Summary Judgment, CR 59, at p. 5.) It is undisputed by the State that, in the absence of the footnote, Planned Parenthood would be entitled to receive State and Federal funds under the Title XX program. [Emphasis in original.]

The State's reliance on Maher v. Roe, 432 U.S. 464 (1977) is misplaced. Planned Parenthood does not seek to compel funding of activities which the State has chosen not to fund. Again, the undisputed facts are that the State has already determined to make money available for family planning services under Title XX, and that Planned Parenthood is a qualified recipient of those funds. These funds were sought to be denied to Planned Parenthood solely on the basis that it engages in the constitutionally protected activities of providing abortions and/or abortion counseling and referrals [footnote omitted; emphasis in original.]